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OCT 3 0 2006
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SUPREME COURT, U.S.

No. 06-446

In The

Supreme Court of the United States

JIMMY V. DUNN, *et al.*,

Petitioners,

v.

NITRO DISTRIBUTING, INC., *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Missouri

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does a non-signatory "clearly and unmistakably" agree to let an arbitrator, rather than the court, determine the existence, scope and validity of a purported arbitration agreement even though that person never signed a writing containing an arbitration clause and thus never expressly agreed to any arbitration rules incorporated therein by reference, including an "arbitrator may decide arbitrability" clause?

CORPORATE DISCLOSURE STATEMENT

Respondents Nitro Distributing, Inc., and West Palm Convention Services, Inc., have no parent companies and no subsidiaries. No publicly held company owns 10 percent or more of either Respondent.

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RESPONDENTS' BRIEF IN OPPOSITION

The Petition should be denied. The issue raised in petitioners' Question Presented was never addressed by the Missouri Supreme Court or by any lower court. Thus, this case presents no direct conflict and no live issue for the Court's consideration. Nor have petitioners managed to show any significant conflict among other courts on the issue they raise.

The Question Presented, as framed by petitioners, is whether parties have "clearly and unmistakably" agreed to have the issue of arbitrability decided by an arbitrator, rather than a court, when an "arbitrator may decide arbitrability" clause is merely incorporated by reference in, rather than expressly set forth on the face of, an arbitration agreement. But none of the courts below expressed an opinion on that issue one way or the other. Nor did they even need to reach that question here. In fact, even if the arbitrability clause had been plainly stated on the face of the purported arbitration agreement, the result here would be no different. The Missouri Supreme Court could not reach the question of whether the parties agreed to arbitrate arbitrability unless and until it first determined the substantive "gateway" issue of whether the non-signatories agreed to the arbitration provision itself. If, as here, the non-signatories[1] never

[1] The Missouri Supreme Court did find that one of the plaintiffs here was a signatory to one of the three purported arbitration agreements at issue. Having found an arbitration agreement, it compelled that plaintiff to arbitrate its claims with the other signatories to that agreement. Because petitioners have thus received the relief to which they are entitled, the question of whether that decision should have been made by an arbitrator (as petitioners urge) or by the court (as respondents submit) is a moot issue.

agreed to arbitrate in the first instance, they obviously never agreed to any arbitration rules incorporated by reference, such as a rule authorizing an arbitrator to decide arbitrability.

Even if the Missouri Supreme Court had addressed petitioners' Question Presented, it is premature to declare that there is a true conflict among the courts on this issue. Petitioners cite to only one case – a South Dakota state court decision – that expressly held that incorporation of an arbitrability clause by reference is insufficient to constitute clear and unmistakable evidence of an agreement to arbitrate arbitrability. South Dakota stands alone against the First, Second, Eighth and Eleventh Circuits, and the Delaware Supreme Court, all of which have held to the contrary. A single aberrant decision from a state court does not create the type of intolerable conflict that justifies this Court's intervention.

For these reasons, petitioners have not demonstrated compelling reasons for granting certiorari, and their Petition should be denied.

STATEMENT OF THE CASE

Petitioners' rather simplistic Statement of the Case belies this dispute's complexities. This arbitrability dispute arose from a lawsuit filed by plaintiffs-respondents in this case, Nitro Distributing, Inc. ("Nitro"), and West Palm Convention Services, Inc. ("West Palm"), against eighteen individuals and corporations, fourteen of which are petitioners here. Nitro and West Palm are, or at least until the events giving rise to their suit were, engaged in the sale of Amway-related "BSMs" (business support materials).

BSMs are motivational products (*e.g.*, audiotapes, videotapes and literature, also known as "tools") and services (seminars, rallies, and conventions, referred to as "functions") used to motivate and train Amway distributors. In their lawsuit, plaintiffs Nitro and West Palm alleged, in essence, that the petitioners, all of whom are competitors of plaintiffs in the Amway-related BSMs business, conspired to deprive Nitro and West Palm of their businesses.

At issue in this case are not one but three purported arbitration agreements: (1) the Amway Arbitration Agreement; (2) the "Transition to Pro Net" Arbitration Agreement; and (3) the Pro Net Arbitration Agreement. As explained in more detail below, it was undisputed that Nitro and West Palm were not signatories to either the Amway Arbitration Agreement or the Transition to Pro Net Arbitration Agreement, and that West Palm was not a signatory to the Pro Net Arbitration Agreement. Applying ordinary state contract law principles, the Missouri Supreme Court held that these non-signatories were not bound to arbitrate under any of the assorted legal theories advanced by defendants/petitioners, such as third-party beneficiary and agency. Given its finding that these parties never agreed to arbitrate in the first place, the Missouri Supreme Court had no occasion to reach the question of what their non-existent agreement may have provided, including whether Nitro or West Palm agreed to let an arbitrator decide arbitrability, or whether they did so clearly and unmistakably. Nor was this non-issue reached by either of the lower courts.

With respect to the Pro Net Arbitration Agreement, the Missouri Supreme Court found that one of the plaintiffs, Nitro, was a signatory.[2] Having found an agreement to arbitrate, it compelled Nitro to arbitrate its claims with the signatory petitioners, just as it was required to do. Because Nitro was, in fact, compelled to arbitrate with the signatory petitioners, petitioners' Question is to this extent moot.

I. The Amway Arbitration Agreement

Petitioners first sought to compel arbitration under the Amway Arbitration Agreement, notwithstanding the fact that neither Nitro nor West Palm are Amway distributors and notwithstanding the critical fact that neither were signatories to any Amway distributorship agreement or arbitration provision. In an effort to avoid this generally fatal problem, petitioners theorized that Nitro and West Palm's owner, non-party Ken Stewart, and/or his Amway distributorship, non-party Stewart & Associates International, Inc. ("Stewart Associates"), made an arbitration agreement with non-party Amway. They then attempted to bind Nitro and West Palm to that supposed agreement asserting various legal theories, including alter ego, agency, third-party beneficiary and estoppel.

In the courts below, petitioners relied on four separate writings dating from 1980 to 1997 in their quest to show that Ken Stewart and/or Stewart Associates made an arbitration agreement with Amway. Only one of those

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[2] The other plaintiff, West Palm, was not a signatory to the Pro Net agreement and, the Missouri Supreme Court found, was not otherwise bound to arbitrate under ordinary state contract law principles.

writings actually contained an arbitration clause, and that is the only agreement now cited by petitioners in their Petition for a Writ of Certiorari. That document, the 1997 "Acknowledgment of Distributor Changes," was signed by non-party Ken Stewart on behalf of non-party Stewart Associates. (Pet. App. at 83a). It contained an arbitration clause that incorporated by reference Amway's Rules of Conduct, which, in turn, set forth the rules by which arbitration would be conducted. Those rules provided for arbitration before JAMS/Endispute, Inc. (*id.* at 85a), and also included a rule stating that "disputes over the existence, validity, interpretation or scope of the agreement . . . *may* be submitted to and ruled on by the Arbitrator, *unless the relevant law requires that a court make such determination.*" (*Id.* at 84a (emphasis added)).

Plaintiffs argued that an arbitration agreement was never formed between Ken Stewart and/or Stewart Associates and Amway because, among other things, the arbitration provision was illusory[3] and unconscionable.[4] Therefore, Nitro and West Palm could not be bound to this non-existent arbitration agreement under any legal theory. Further, even if the arbitration provision were valid and enforceable, under ordinary state contract law principles, petitioners failed to demonstrate an alter ego, agency or third-party beneficiary relationship, or estoppel so as to bind Nitro and West Palm to arbitrate. Finally, plaintiffs

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[3] Amway reserved the right to unilaterally change its rules at any time.

[4] Among many other things, Amway hand-picked and then trained these select arbitrators on the very substantive legal issues they would be asked to decide in arbitration. These were the only arbitrators eligible to hear disputes under the Amway Arbitration Agreement.

argued that BSMs disputes were not within the scope of the Amway Arbitration Agreement.

In a letter ruling, the trial court stated that the Amway Arbitration Provision was unconscionable, and therefore denied petitioners' motion to compel arbitration. (*Id.* at 40a-42a). After petitioners moved for rehearing, the trial court issued its judgment denying arbitration without explaining its decision. (*Id.* at 43a). The appellate court did not reach the Amway Arbitration Provision because it found that Nitro and West Palm were bound to arbitrate under the Pro Net Arbitration Agreement – a finding later reversed as to West Palm.

On review, the Missouri Supreme Court affirmed in part and reversed in part the trial court's denial of petitioners' motion to compel arbitration. Skipping past the issue of whether the supposed agreement between non-parties Ken Stewart, Stewart Associates and/or Amway was unconscionable as the trial court had found, the Court held that non-signatories Nitro and West Palm were not third party beneficiaries or agents and thus could not be bound to the Amway Arbitration Agreement. (*Id.* at 4a-5a). The Court also rejected petitioners' argument that Nitro and West Palm agreed to arbitrate under Amway's arbitration provision when they (purportedly) became members of Pro Net. (*Id.* at 5a-6a).

Importantly, neither the Missouri Supreme Court nor either of the lower courts ever even mentioned the arbitrability clause, let alone that clear and unmistakable evidence of an agreement to let an arbitrator decide arbitrability was lacking because the arbitrability clause was only incorporated by reference.

II. The Transition To Pro Net Arbitration Agreement

The second document that petitioners argue constitutes an agreement by Nitro and West Palm to arbitrate is the "Transition to Pro Net" Arbitration Agreement. (*Id.* at 79a-82a). That document provides that the signatories agree to submit certain disputes "to final and binding arbitration with J*A*M*S/ENDISPUTE, in accordance with Rule 7 of the Amway/ADA Arbitration Rules and Procedures." (*Id.* at 79a). Assuming that this is even a reference to the Amway Arbitration Provision – which is set forth in Amway Rules of Conduct, Rule 11, not Rule 7 (*id.* at 84a) – then the arbitrability clause quoted above would be incorporated by reference.

But, as is evident on the face of the document, neither Nitro nor West Palm are signatories. (*Id.* at 79a). Applying ordinary state law principles, the Missouri Supreme Court found that the agreement was signed by Ken Stewart in his individual capacity, and not on behalf of either Nitro or West Palm. (*Id.* at 7a-8a). Once again, having found no agreement to arbitrate, the Missouri Supreme Court did not need to, and did not in fact, reach the issue of whether the parties agreed to let an arbitrator decide arbitrability. Nor did the trial court or appellate court, neither of whom even addressed the Transition to Pro Net Agreement.

III. The Pro Net Arbitration Agreement

The third and final document that petitioners argued binds Nitro and West Palm to arbitrate is the Pro Net Arbitration Agreement. Pro Net Global Association, Inc., was incorporated as a trade association whose members, according to Pro Net's own bylaws, are limited to *Amway* distributors, not BSMs businesses such as Nitro and West

Palm. (*See id.* at 11a). Non-party Ken Stewart was one of the founding members of Pro Net, along with petitioners Hal Gooch, Bill Childers, Tim Foley and Steve Woods.

Even though Nitro was not an Amway distributor and therefore not eligible for Pro Net membership, Ken Stewart completed the Pro Net membership application form listing "Ken Stewart/Nitro Distributing" as the "Member Name." (*Id.* at 73a). Ken Stewart signed the document as President of Nitro. (*Id.*). The application form itself did not contain an arbitration clause. (*See id.*). Instead, it contained an agreement to abide by "all Terms and Conditions of Association Membership." (*See id.*). Petitioners argued that two documents accompanied the membership application form (a disputed fact) that supposedly contained the terms and conditions of membership. (*See id.* at 70a-72a; 74a-76a). Both documents contained an arbitration clause requiring arbitration before the AAA. One of the documents stated that the application form must be completed by "all applicants . . . for *regular* membership in Pro Net Global Association." (*Id.* at 70a (emphasis added)). The other document stated that it is "an application for *non-voting* membership to the Association." (*Id.* at 74a (emphasis added)). Ken Stewart was a "founding" member, not a "regular" member. (*Id.* at 12a). Only founding members have voting rights; "regular" members do not.

The AAA Commercial Arbitration Rules, in turn, contain an arbitrability clause, which provides that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." AAA Rule R-7(a). (*Id.* at 86a).

Notwithstanding that its name appears on the Pro Net application, Nitro opposed arbitration on several grounds. The Missouri Supreme Court addressed – and rejected – two of those arguments. First, Nitro argued that there was no meeting of the minds on an essential term of the contract. (*Id.* at 11a). Ken Stewart signed Nitro's name to the Pro Net membership application in the mistaken belief that the members of Pro Net would be *BSMs* companies. (*Id.*). Mr. Stewart did not realize that Pro Net's Bylaws limited membership to *Amway* corporations because petitioners refused to let him see Pro Net's Bylaws, even though he was a founding member.

Second, Nitro argued, the arbitration clause expressly applies only to regular, not founding, members. Because Ken Stewart was a founding, not a regular member, the arbitration provision did not apply to him or Nitro. (*Id.* at 12a).

The Missouri Supreme Court rejected both of those arguments. Finding that Nitro made an arbitration agreement, the Court compelled Nitro to arbitrate its claims against the other signatories. (*Id.* at 17a-18a). The court did not address plaintiffs' other arguments such as the illegality of Pro Net (*see id.* at 39a), waiver, or economic duress (*see id.* at 49a, 60a). Nor did it decide the scope of arbitration. Although the Court did consider plaintiffs' "membership ineligibility" argument, which petitioners contend should have been resolved by an arbitrator (*see id.* at 49a, 60a), that issue is moot because the court rejected that argument and compelled Nitro to arbitrate.

With respect to West Palm, it was not a signatory to the Pro Net Agreement. (*Id.* at 8a). Applying generally

applicable state contract law principles, the Missouri Supreme Court held that West Palm was not bound to arbitrate under the Pro Net Agreement under third-party beneficiary, estoppel or alter ego theories. (*Id.* at 8a-11a). There being no agreement by West Palm to arbitrate, the Court did not reach – indeed, it was unnecessary to reach – the question of whether West Palm agreed to let an arbitrator decide arbitrability, let alone whether West Palm did so clearly and unmistakably.

REASONS FOR DENYING THE WRIT

I. This Case Is Not Certworthy Because It Does Not Present The Issue Asserted In Petitioners' Question Presented

The Court should deny certiorari because this case simply does not implicate the issue asserted in petitioners' Question Presented. As is plainly evident from the face of the opinions and judgment of the courts below, not one stated that it was refusing to give effect to an arbitrability clause because it was incorporated by reference rather than expressly printed on the face of the arbitration agreement.[5] Simply stated, it was a non-issue in this case.

[5] Nor can it reasonably be inferred from the Court's silence on the issue that the reason it did not perfunctorily ship this case off to arbitration, as petitioners had urged, was that the arbitrability clause was only incorporated by reference. As shown below, notwithstanding the existence of an arbitrability clause, the Missouri Supreme Court had a duty to first determine whether the non-signatories made an arbitration agreement before it could compel arbitration of *any* issue.

A. The Result Below Would Be The Same Even If An Arbitrability Clause Were Expressly Stated In The Purported Arbitration Agreement

Petitioners' real complaint has absolutely nothing whatsoever to do with whether "incorporation by reference" satisfies *First Options'* "clear and unmistakable" evidence standard. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). Indeed, the result in this case would be exactly the same even if the arbitrability clause had been plainly stated in large, bold print on the face of the purported arbitration agreements. Unless and until a court first determines that a non-signatory agreed to arbitrate *something,* it logically cannot reach the question of whether that non-signatory also agreed to arbitrate arbitrability. Were it otherwise, a party could merely wave an unsigned piece of paper containing an arbitration provision and arbitrability clause, proclaim to the court that some person agreed to it and, despite the notable absence of his signature, compel that non-signatory to arbitrate something he never agreed to arbitrate. That is precisely what petitioners are attempting to do here. But this Court has re-affirmed time and again that the issue of whether a non-signatory is bound by an arbitration agreement it did not sign is an issue for the court, not an arbitrator, to decide. *See, e.g., First Options,* 514 U.S. at 944; *Howsam v. Dean Witter Reynolds, Inc.,* 537 U.S. 79, 84 (2002). Requiring a person to arbitrate *anything* – be it the merits or arbitrability – based on a supposed agreement that person never signed, without first finding that he is otherwise bound under ordinary contract principles, violates the first principle of arbitration: a person cannot be compelled to arbitrate

something he did not agree to arbitrate. *See AT&T Tech., Inc. v. Communications Workers of America,* 475 U.S. 643, 648 (1986).

Petitioners' real contention – although not asserted in their Question Presented – is that the arbitrability clauses here completely divested the Missouri Supreme Court (and lower courts) of any jurisdiction whatsoever to determine the "existence" of an arbitration agreement – even as to non-signatories who never signed *any* writing containing an arbitration clause. Petitioners' real complaint is thus nothing more than that the Missouri Supreme Court erred in deciding the "existence" of an arbitration agreement,[6] instead of referring that question to an arbitrator. But, of course, even if the Missouri Supreme Court had erred – which it did not – one court's purported error does not make a certworthy case.

Recognizing this, petitioners try to fit this case into a perceived conflict among *other* courts as to whether an arbitrability clause that is merely incorporated by reference provides clear and unmistakable evidence of an agreement to arbitrate arbitrability. But this case does not fit. There is a decisive difference between this case and the cases cited by petitioners that squarely present the perceived conflict. In all of the cases cited by petitioners, the party trying to avoid arbitration was a *signatory* who

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[6] The Missouri Supreme Court did not address the "validity" of any of the three arbitration agreements (*e.g.*, unconscionability). Nor did the Court address the "scope" of the agreements other than with respect to the Amway Arbitration Agreement. But that discussion was mere surplusage, as the Court had already determined that Nitro and West Palm were not bound. Thus, petitioners' arguments here relate solely to the arbitrator's authority to determine the "existence" of an arbitration agreement.

plainly agreed to arbitrate and who thus agreed to the terms incorporated by reference, including arbitrability clauses. *See Flandreau Pub. Sch. Dist. #50-3 v. G.A. Johnson Constr., Inc.*, 701 N.W.2d 430, 434 (S.D. 2005); *Apollo Computer v. Berg*, 886 F.2d 469, 470 (1st Cir. 1989); *Contec Corp. v. Remote Solution Co.*, 398 F.3d 205, 207 (2d Cir. 2005); *FSC Sec. Corp. v. Freel*, 14 F.3d 1310, 1311 (8th Cir. 1994); *Terminix Int'l Co. v. Palmer Ranch Ltd. P'ship*, 432 F.3d 1327, 1328 (11th Cir. 2005); *James & Jackson, LLC v. Willie Gary, LLC*, 906 A.2d 76 (Del. 2006).[7] In contrast, in this case, the Missouri Supreme Court was presented (with one exception) with *non-signatories* who never signed any writing containing an arbitration clause, and therefore never agreed to any incorporated arbitration rules, including any rule authorizing arbitrators to determine arbitrability.

With respect to the one party here that the Missouri Supreme Court found did sign an arbitration agreement (Nitro in the Pro Net Arbitration Agreement), petitioners' issue is moot. The Missouri Supreme Court compelled Nitro to arbitrate its claims with the other signatories to the Pro Net Agreement. In effect, the court properly enforced the arbitrability clause because it referred the signatories to arbitration without considering any issues beyond assent to arbitration, such as the scope of the Pro Net Agreement, its illegality, waiver, or duress.

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[7] Contrary to petitioners' suggestion, the Federal Circuit in *Microchip* did not express an opinion one way or the other on whether incorporation by reference satisfies *First Options*' clear and unmistakable evidence standard. *See Microchip Technology, Inc. v. Phillips Corp.*, 367 F.3d 1350, 1354 (Fed. Cir. 2004). Therefore, it does not squarely present the issue as to which petitioners perceive a conflict.

In sum, this case has nothing to do with whether an arbitrability clause that is incorporated by reference satisfies *First Options'* "clear and unmistakable evidence" standard. Regardless of the existence of an arbitrability clause – be it on the face of the document or incorporated by reference – a court cannot abdicate its duty to decide the gateway issue of whether a non-signatory is bound by an agreement it did not sign.

II. Petitioners Have Not Shown A True Conflict

Even if petitioners had raised a live issue, their Petition should still be denied. Petitioners cite to only one case – from the South Dakota Supreme Court – that expressly held that incorporation of an arbitrability clause by reference is insufficient to constitute clear and unmistakable evidence of an agreement to arbitrate arbitrability. *See Flandreau Pub. Sch. Dist. #50-3 v. G.A. Johnson Constr., Inc.*, 701 N.W.2d 430 (S.D. 2005). An overwhelming majority of courts, on the other hand, have held that incorporation by reference is sufficient. *See Apollo Computer v. Berg,* 886 F.2d 469 (1st Cir. 1989); *Contec Corp. v. Remote Solution Co.,* 398 F.3d 205 (2d Cir. 2005); *FSC Sec. Corp. v. Freel,* 14 F.3d 1310 (8th Cir. 1994); *Terminix Int'l Co. v. Palmer Ranch Ltd. P'ship,* 432 F.3d 1327 (11th Cir. 2005); *James & Jackson, LLC v. Willie Gary, LLC,* 906 A.2d 76 (Del. 2006).

A single aberration does not create the type of intolerable conflict that justifies this Court's intervention. As Justice Stevens wrote:

> [T]he existence of differing rules of law in different sections of our great country is not always an intolerable evil * * *. It would be better, of

> course, if federal law could be applied uniformly in all federal courts, but experience with conflicting interpretations of federal rules [of law] may help to illuminate an issue before it is finally resolved and thus may play a constructive role in the lawmaking process. The doctrine of judicial restraint teaches us that patience in the judicial resolution of conflicts may sometimes produce the most desirable result.

Stevens, J., *Some Thoughts on Judicial Restraint*, 66 Judicature 177, 183 (1982).

Patience in the present case may well reveal that the *Flandreau* decision will remain isolated, or be overturned. There is insufficient confusion in the lower courts now to justify this Court's intervention, even if the present case affected the perceived "conflict" in any way.

CONCLUSION

For these reasons, petitioners' Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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